No. 22-132

In the Supreme Court of the United States

CARLOS R. RUIZ,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a jury's consideration of a non-testifying defendant's courtroom demeanor during a criminal trial violates the defendant's right to remain silent or any right to a verdict based only on evidence in the record.

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INTRODUCTION

The petition elides a critical distinction between the decision below—itself just an unpublished, non-precedential opinion from Massachusetts' intermediate appellate court—and nearly every other case that the petition cites: the issue of defendant demeanor arose here from a jury question during deliberations, rather than from a prosecutor's reference to demeanor during trial. This distinction alone undermines any suggestion of a square split here, and also renders this case an inappropriate vehicle for considering the question presented.

The split of authority asserted in the petition does not withstand scrutiny in other respects as well. Because fourteen of the fifteen cases the petition cites in alleging a split involved comments by a prosecutor, those cases turned on standards of prosecutorial conduct that are irrelevant here. The fifteenth case, which involved a jury question, found no constitutional violation. Many of the cited cases did not even squarely address one or both of the specific constitutional theories raised in the petition, and those that did are distinguishable on multiple grounds. Although the petition cites nine cases purportedly in opposition to the case at bar, there is simply no basis—either in the non-precedential decision below or in Massachusetts precedent more broadly—to conclude that a Massachusetts court would necessarily reach different results than those courts on the facts presented in those cases.

Moreover, this case is not a suitable vehicle for addressing the issues raised in the petition for at least

three reasons. First, the jury's cryptic note creates an inadequate record. It is not clear whether the jury was interested in the demeanor of the petitioner, his co-defendant, or both, and for what purpose. Indeed, because a videotaped recording in which both defendants appeared was played as part of the evidence at trial, it is not even clear that the jury was interested in courtroom demeanor at all. Second, following further percolation, a federal prosecution would present a better vehicle for considering the issues addressed in the petition, because it would allow the Court to consider the potential relevance of the rules of evidence as well as constitutional principles. Finally, a decision in the petitioner's favor on the question presented would not entitle the petitioner to relief, because any error was harmless. The petition's assertion that the demeanor issue is the most obvious explanation for the split verdict in the case is absurd; that result is much more reasonably explained by the fact that the evidence against the petitioner at trial was far stronger than the evidence against his co-defendant.

Review by this Court is therefore unwarranted. *See* Sup. Ct. R. 10.

STATEMENT

1. In February of 2014, police in Worcester, Massachusetts, executed a search warrant at a two-bedroom apartment. Pet. App. 1a, 2a. Shortly before searching the apartment, police stopped and searched the two occupants—the petitioner and his girlfriend, Yaritza Delacruz. Pet. App. 1a n.1. Police seized a set

of keys from the petitioner, but no keys were seized from Delacruz. T(2) 15.[1]

The police then searched the petitioner's apartment. Officers filmed the search of the apartment, and both the petitioner and Delacruz appear in a portion of that video shown at trial. Pet. App. 5a.

During the search, a police dog sweeping for narcotics indicated the potential presence of narcotics in the apartment's only bathroom and in one of the two bedrooms. T(1) 208. In the bathroom, officers found drug-packaging material concealed above loose ceiling tiles. *Id.* at 209. In the bedroom's closet, which contained clothing traditionally associated with men, officers found two digital scales and a bag containing over twenty grams of heroin. Pet. App. 2a. In that same closet in a file cabinet, officers found a tin that contained two smaller bags of heroin. Pet. App. 2a. Also in the closet, in the pocket of a jacket, was a lease for the apartment, signed by the petitioner. Pet. App. 2a.

During the search of the apartment, officers determined that one of the keys they had seized from the petitioner opened the lock on the apartment's front door. Pet. App. 1a n.1. Another one of his keys opened the lock on the closet in which the heroin was stored. Pet. App. 1a n.1. A third key opened the lock on the file cabinet in which police found the two smaller bags of heroin. Pet. App. 2a.

No drugs were found in the apartment's other bedroom. That bedroom's closet did not have a lock on

[1] T( ) __ refers to a volume and page of the trial transcript on file with the Massachusetts Appeals Court below.

its door, and it contained clothing traditionally associated with women. Pet. App. 2a. Utility bills for the apartment, addressed to Delacruz, were found in that bedroom. T(1) 224-25.

2. A Worcester County grand jury indicted the petitioner and Delacruz for trafficking heroin in an amount between eighteen and thirty-six grams. Pet. App. 1a. During a three-day trial in March of 2020, the jury heard testimony from various law-enforcement witnesses and watched the video of the search of the apartment. Pet. App. 1a n.1, 2a, 5a. Neither defendant testified. None of the attorneys commented on the defendants' demeanor, either as it appeared in the video or as observed in the courtroom. During his closing argument, the petitioner's counsel conceded that the smaller bags of heroin were the petitioner's. Pet. App. 2a. More specifically, counsel emphasized that the petitioner had the key to the file cabinet that was located in the closet and said that "[w]hatever was in that filing cabinet was [the petitioner's]." Pet. App. 2a.

Two hours into their deliberations, the jury sent two questions to the trial judge. Pet. App. 5a, 9a-10a. They asked, in reference to the video of the search of the apartment, "Can we please see the video?" Pet. App. 10a. In response, and without objection, the trial judge informed the jury that they would shortly receive the equipment necessary to watch the video. Pet. App. 10a.

In the second question, the jury asked, "Can we take the defendants [sic] body language into consideration? As evidence?" Pet. App. 5a, 10a. The trial judge and the attorneys discussed potential responses. Pet. App. 5a, 10a-14a. Responding first,

the prosecutor said, "I would say if they are talking about body language on the video, . . . I'd suggest that that is in evidence and they could consider that if they deem it to have any sort of evidentiary value." Pet. App. 10a. Next, Delacruz's counsel said, "I always tell my client to remain as still as possible . . . . I'm not quite sure what they're getting at. But I would just tend to agree with the prosecution that body language on the video, fine. This one, I think I'd ask you to stay away from." Pet. App. 10a. Finally, the petitioner's trial attorney said, "I'm not sure if I understand the question. But . . . , if it applies to the courtroom versus the video—if it applies to body language in the courtroom, I would ask that they not be able to consider that because [the petitioner and Delacruz] have a right to remain silent." Pet. App. 10a-11a.

Following this exchange, over the petitioner's objection, the trial judge responded to the jury in writing: "While not evidence, the jury is entitled to consider any observations you made of the defendants' demeanor during trial." Pet. App. 5a, 15a-16a. Later that day, the jury convicted the petitioner and acquitted Delacruz. Pet. App. 1a.

3. In an unpublished, non-precedential opinion, the Massachusetts Appeals Court affirmed the petitioner's conviction. Pet. App. 1a-7a. On the petitioner's claim relating to the jury question, the Appeals Court determined that the judge's response was consistent with Massachusetts law. Pet. App. 6a.[2]

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[2] In addition to his claim regarding the jury question, the petitioner contended that the trial judge erroneously refused to instruct the jury on the lesser-included offense of simple possession. Pet. App. 1a. The Appeals Court determined that,

The Supreme Judicial Court denied the petitioner's application for further appellate review on March 17, 2022. Pet. App. 8a.

REASONS TO DENY THE WRIT

This Court should deny the petition because it fails to demonstrate a square split on either of the two constitutional claims it raises, and because this case is an exceedingly poor vehicle for considering those issues.

I. The Split Of Authority Posited In The Petition Is Illusory.

Although the petition asserts that two constitutional principles are at stake here—a right to a verdict "based only on evidence in the record" and the right to remain silent, Pet. 13-18—its attempt to outline a split in authority is notably opaque as to how the cited cases address those specific principles. *See*, *e.g.*, Pet. 6 (stating generically that lower courts are divided "on a question of federal constitutional law"). Upon closer examination, it is clear that no square split is presented.

To begin with, not one of the fifteen cases cited in the petition in support of a split conflicts with the decision below, because the demeanor issue here arose from a jury question. Only one of the cited cases involved a jury question relating to demeanor, and the

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although the trial judge erred by not instructing the jury on simple possession, the error was not prejudicial. Pet. App. 4a-5a.

court in that case found no constitutional violation. *State v. Barry*, 352 P.3d 161 (Wash. 2015) (en banc).[3]

In the other fourteen cases, a *prosecutor* commented on demeanor. Those cases thus hinge on questions about the propriety of prosecutorial argument that are wholly inapplicable here. *See*, *e.g.*, *United States v. Mendoza*, 522 F.3d 482, 496 (5th Cir. 2008) (considering whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process" under the standard for prosecutorial misconduct stated in *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *United States v. Schuler*, 813 F.2d 978, 981 (9th Cir. 1987) ("We have recognized that a prosecutor may not seek to obtain a conviction by going beyond the admissible evidence."); *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (noting that the "'sole purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence'") (citation omitted); *Dickinson v. State*, 685 S.W.2d 320, 322-23 (Tex. Ct. Crim. App. 1984) (en banc) (prosecutor's comments did not "fall within the permissible perimeters of proper jury summation"). Four of the cases also consider whether the prosecutor, by commenting on demeanor, improperly introduced

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[3] In *Barry*, the jury sent a note during deliberations asking whether it could consider its observations of the defendant's "actions-demeanor during the court case" as evidence. 352 P.3 at 164. The trial court responded that evidence "includes what you witness in the courtroom." *Id.* On appeal, the Washington Supreme Court rejected arguments that the trial court's instruction violated the defendant's Fifth and Sixth Amendment rights. *Id.* at 166-72. Since the state conceded non-constitutional error, however, the court undertook a prejudice analysis, and affirmed based on a finding of no prejudice. *Id.* at 166, 173.

character evidence to prove guilt under the Federal Rules of Evidence, an issue that is not applicable here. *See Mendoza*, 522 F.3d at 495; *Schuler*, 813 F.2d at 980; *Pearson*, 746 F.2d at 796; *United States v. Carroll*, 678 F.2d 1208, 1210 (4th Cir. 1982).[4]

Additional factual distinctions further remove many of the petitioner's cases from the circumstances here. Two of the cited cases involved a testifying defendant. *State v. Sisneros*, 2002 WL 31888186, 59 P.3d 931 (Haw. 2002) (unpublished); *Good v. State*, 723 S.W.2d 734, 735 (Tex. Ct. Crim. App. 1986) (en banc). The petitioner here did not testify, and the petition itself excludes testifying defendants from the scope of the question presented. Pet. i (defining question presented with respect to "a *non-testifying* criminal defendant's courtroom demeanor") (emphasis added); *see* Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). In three other cited cases, the prosecutorial comments on demeanor occurred during the *penalty phase* of the trial rather during than the guilt phase. *People v. Heishman*, 753 P.2d 629, 662-63 (Cal. 1988), *abrogated on other grounds by People v. Diaz*, 345 P.3d 62 (Cal. 2015); *State v. Brown*, 358 S.E.2d 1, 14-16 (N.C. 1987); *Dickinson*, 685 S.W.2d at 322. And in *Heishman*, this

[4] The two cases that the petition characterizes as "touch[ing] on the split" also involved prosecutorial comments rather than a jury question. Pet. 10 n.2 (citing *United States v. Zemlyansky*, 908 F.3d 1, 14-17 (2d Cir. 2018); *United States v. Wright*, 489 F.2d 1181, 1185-86 (D.C. Cir. 1973)).

fact determined the outcome on the demeanor issue. 753 P.2d at 663.[5]

The purported split disintegrates further upon considering the two different legal theories referenced in the petition. First, with respect to whether reference to demeanor violates a constitutional right to be convicted based on record evidence alone, the petitioner's cited cases cannot establish a split with the decision below because, in all of those cases (apart from *Barry*, as noted above), a prosecutor actively pointed to an aspect of the defendant's demeanor during trial, thus arguably drawing on a specific aspect of demeanor as evidence. *See, e,g.*, *Mendoza*, 522 F.3d at 496 (prosecutor compared defendant's calm demeanor during trial with calm demeanor when stopped at the border); *Schuler*, 813 F.2d at 979-80 (prosecutor told jurors that defendant laughed during trial; court found that prosecutor's strategy was to suggest that defendant was of bad character in order to prove guilt); *Pearson*, 746 F.2d at 796 (prosecutor commented that defendant looked nervous during trial); *Carroll*, 678 F.2d at 1209 (prosecutor observed that defendant was pointing at evidence during trial, and suggested that defendant "knew so much" about

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[5] With respect to *Sisneros* and *Heishman*, even beyond the important points already noted, the petition's characterization of these cases as forming a split with the case at bar also fails because neither decision actually found error based on demeanor-related comments. *Sisneros*, 2002 WL 31888186 at *2; *Heishman*, 753 P.2d at 662-63. Any seemingly relevant language from these cases is thus dicta. The petition justifies the citation of *Sisneros* on the ground that it cites another decision, *State v. Smith*, 984 P.2d 1276 (Haw. Ct. App. 1999), "approvingly." Pet. 12. In fact, *Sisneros* cites *Smith* only to distinguish it as "inapposite." *Sisneros*, 2002 WL 31888186 at *2.

the evidence because he was guilty); *Smith*, 984 P.2d at 1281 (prosecutor commented that defendant "chortled" and was "grumbling" during testimony of witness); *Good*, 723 S.W.2d at 735 (prosecutor told jury that defendant sat in court "cold, unnerved, uncaring" and "that has to do with the fact that he is guilty"). Nothing at all similar occurred here: As discussed in more detail in Part II.A, *infra*, the record in this case does not even reveal to which defendant the jury's question pertained or whether it was the defendant's demeanor in court or on video, let alone what aspect of that person's demeanor was of interest to the jury, and the judge specifically instructed the jury that the petitioner's courtroom demeanor was *not* evidence. Moreover, the petition greatly overstates any tension on this issue; at least eight of the petitioner's cited cases did not even decide it. *State v. Sena*, 470 P.3d 227 (N.M. 2020); *Smith v. State*, 669 S.E.2d 98 (Ga. 2008); *Armstrong v. State*, 233 S.W.3d 627 (Ark. 2006); *Sisneros*, 2002 WL 31888186, 59 P.3d 931; *State v. Hill*, 661 N.E.2d 1068 (Ohio 1996); *Heishman*, 753 P.2d 629; *Brown*, 358 S.E.2d 1; *Dickinson*, 685 S.W.2d 320.[6]

Nor, for similar reasons, does the decision below diverge from other courts on the question whether reference to demeanor violates the right to remain silent. As discussed above, in all of the petitioner's cited cases (with the exception, again, of *Barry*, where

[6] A general discussion of whether demeanor constitutes evidence, as occurred in *Brown*, *Armstrong*, *Sena*, and *Hill,* is of course not a decision on this constitutional question. The courts in those cases did not address or even mention a constitutional right to be convicted on record evidence alone, as discussed in the petition. *See Brown*, 358 S.E.2d at 15; *Armstrong*, 233 S.W.3d at 638-39; *Sena*, 470 P.3d at 234-37; *Hill*, 661 N.E.2d at 1078.

the court found no constitutional violation), a prosecutor specifically called out some aspect of the defendant's (generally silent) demeanor to the jury. Such comments naturally raised the question, to be "examined in context," of whether the prosecutor had improperly commented "on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615 (1965); *see also United States v. Robinson*, 485 U.S. 25, 33 (1988). In *Dickinson*, for example, where the prosecutor commented on the defendant's apparent lack of remorse, the court noted that "remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence." 685 S.W.2d at 325. Approving such a comment would thus "amount to permitting jurors to infer lack of remorse from the exercise by the appellant of his constitutional right to remain silent." *Id.* And in *Sena*, the prosecutor argued that the defendant was unwilling to look at the victim when she took the stand because the defendant "knew what he'd done." 470 P.3d at 234-35. The court determined that the comments violated the right to remain silent because they "had no purpose other than to invite the jury to draw an adverse conclusion from [d]efendant's failure to get on the stand and explain why he would not look at [v]ictim as she testified." *Id.* at 236. Here, by contrast, no one commented on the petitioner's demeanor during trial. And the one court to decide a similar claim, in *Barry*, rejected the suggestion that "a generic reference to the defendant's demeanor" through a jury question and court response was "equivalent to (or a proxy for) a comment on the defendant's failure to testify," because "a generic reference to demeanor cannot be construed as naturally and necessarily referring to the defendant's failure to testify." 352 P.3d at 167; *see also*

id. at 169-70 (distinguishing *Schuler* in part because the prosecutor there "commented in closing argument on the defendant's demeanor and specifically invited the jury to draw a negative inference from that demeanor"). The decision below is therefore not in conflict with any of the cited cases on this constitutional question.

Moreover, the petition also overstates any tension among its cited cases on the right to remain silent. At least five of the cited cases did not decide this issue at all. *Mendoza*, 522 F.3d 482; *Sisneros*, 59 P.3d 931; *Smith*, 984 P.2d 1276; *Hill*, 661 N.E.2d 1068; *Good*, 723 S.W.2d 734. A sixth case is equivocal. *See Schuler*, 813 F.2d at 981 ("[P]rosecutor[ial] comment on a defendant's nontestimonial behavior *may* impinge on that defendant's fifth amendment right not to testify. We do not accept Schuler's contention that such comments in *every* case violate the right to remain silent . . . .") (emphasis added).[7]

Nothing in the Massachusetts Appeals Court's unpublished, non-precedential decision below indicates how Massachusetts courts would rule on facts like those presented in the cases cited in the petition. Indeed, Massachusetts precedent on prosecutorial comments about demeanor points to a nuanced, heavily fact-bound approach. *See*, *e.g.*, *Commonwealth v. Young*, 505 N.E.2d 186, 187-89 (Mass. 1987) (reversing conviction due to prosecutor's comment that defendant sat in court "stone-faced,

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[7] The court in *Mendoza* noted that the defendant did not raise this issue. 522 F.3d at 490-91. In *Sisneros* and *Good*, the defendant testified at trial, as noted above, so the right not to testify was inapposite. *Sisneros*, 2002 WL 31888186 at *2; *Good*, 723 S.W.2d at 736 n.2.

cool, never blinks an eye, doesn't get upset about anything"); *Commonwealth v. Kozec*, 505 N.E.2d 519, 524-25 (Mass. 1987) (prosecutor's argument in closing that defendant looked sorry when victim testified was improper); *but see Commonwealth v. Smith*, 444 N.E.2d 374, 380 (Mass. 1983) (finding no error where prosecutor commented during closing that defendant had "squirm[ed] and smirk[ed] and laugh[ed]" during trial). In *Young*, the SJC held that "a prosecutorial argument that the jury should draw inferences against a defendant who did nothing but behave properly in the courtroom is improper." 505 N.E.2d at 188; *but see id.* (noting precedents where convictions were not reversed because, "although the prosecutor commented on the defendant's courtroom conduct, he did not argue that an inference of guilt should be drawn from it"). This fact-intensive precedent refutes the petition's simplistic assertion that Massachusetts law falls comfortably on one side of petitioner's alleged split.

Lastly, because, as mentioned, the decision below is an unpublished ruling of Massachusetts' intermediate appellate court, it therefore is not binding on any Massachusetts appellate or trial court. *See Chace v. Curran*, 881 N.E.2d 792, 794 n.4 (Mass. App. Ct. 2008). Accordingly, even if another case were presented with the same highly fact-bound circumstances at issue here, a future Massachusetts court would be free to come to a different conclusion.[8]

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[8] Notably, neither *Smith*, 444 N.E.2d 374, nor *Commonwealth v. Watt*, 146 N.E.3d 414 (Mass. 2020)—the two cases cited by the Appeals Court in support of its conclusion below—involved facts identical to those presented here. And neither decision considered the constitutional claims raised here.

In sum, the petition fails to present a square split of authority on either of the two encompassed constitutional theories. It should therefore be denied.

II. This Case Is A Poor Vehicle For Deciding The Question Presented.

This case is not a suitable vehicle for addressing the issues discussed in the petition. The record is unclear in critical respects, a petition arising from a federal prosecution would present a superior vehicle, and the petitioner would not be entitled to relief regardless of the Court's decision on the question presented.

A. Because of the unusual circumstances in which demeanor was raised in the trial below, the record here is inadequate to consider the question presented.

As discussed above, this case does not present the same issue as the vast majority of cases concerning a defendant's demeanor: the constitutionality, and legitimacy under the rules of evidence, of a prosecutor's reliance on demeanor at trial. For that reason, no square split is presented. For related reasons, this case also presents an exceptionally poor vehicle for exploring these issues. In particular, the fact that this case results from a jury question rather than a prosecutor's comment results in a complete lack of record evidence concerning the supposed "demeanor" at issue here—a void extending through at least four salient dimensions.

Moreover, the relevant language in *Watt* is solely dicta. 146 N.E.3d at 430 n.22.

First, it is not even clear whether the demeanor of interest to the jury here was that of the petitioner, of his co-defendant Delacruz (who was later acquitted), or of both of them. This ambiguity arises directly from the jury's own words in their note: the jury asked if they could "take the defendants [sic] body language into consideration." *See* Record Appendix of Appellant, Massachusetts Appeals Court, Dkt. No. 2020-P-0775 ("R. App.") 18. With no apostrophe in the word "defendants" and no specific defendant named in the note, any of these options is possible.[9]

Second, as the Appeals Court observed, the record did not exclude the possibility that the jury, in asking about "body language," was actually interested in demeanor that they observed on the video that was taken during execution of the search warrant, rather than demeanor in the courtroom. Pet. App. 5a ("Because the jury simultaneously [with their question on demeanor] requested to view a video recording in which the defendant made an appearance, there was even some speculation that the jury were referring to body language that the defendant might have displayed in that recording, not his body language during the trial."); *see also* Pet. App. 10a-13a (attorneys and trial court discussing this

[9] The trial transcript includes an apostrophe after the "s" in "defendants" when the trial court read the jury's question out loud in court. Pet. App. 10a. The petition also seems to assume an apostrophe in that spot in the jury's note. *See* Pet. 3. The original question from the jury did not include this apostrophe, however, R. App. 18, and there is no way to know whether the jury intended an apostrophe there. Notably, the petition's assumption of an apostrophe after the "s" seems inconsistent with its suggestion that the jury considered only the petitioner's and not Delacruz's demeanor.

possibility). Any consideration by the jury of demeanor that they saw on a video is not fairly included within the scope of the question presented here concerning "a non-testifying criminal defendant's *courtroom* demeanor." Pet. i (emphasis added).

Third, the jury's note here did not specify what element of demeanor they were interested in, or for what purpose. Such a lack of information does not generally characterize claims arising in the context of alleged prosecutorial misconduct, where both the defendant's demeanor at issue and the reason for focusing on it can usually be gleaned from the prosecutor's comments. *See*, *e.g.*, *Carroll*, 678 F.2d at 1209 (prosecutor argued in closing that fact that defendant pointed to evidence during trial suggested that defendant knew about the evidence and was therefore guilty). As discussed *supra* at 9-12, such details may be important to the analysis of both constitutional claims discussed in the petition.

Fourth, even if the jury in this case did consider the petitioner's in-court demeanor, it is entirely unclear *how* they considered it. In contrast to a case where a prosecutor suggests to the jury that a defendant's demeanor is evidence supporting a guilty verdict, the trial court here specifically instructed the jurors that, while they could "consider" the defendants' demeanor, demeanor was "not evidence." Pet. App. 15a, 16a. And the court had previously instructed the jury about what *was* evidence in the case: namely, what they had "heard from the lips of the witnesses," as well as "the two DVDs with the video recording of the apartment, the photographs, the drugs, the physical items, and the documents received into evidence and marked as exhibits during the trial." T(3) 14-15. A jury "is

presumed to follow its instructions," and "to understand a judge's answer to its question." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). The Court should thus presume that the jury did *not* consider the petitioner's demeanor as evidence in the case.

These multiple uncertainties resulting from the unique facts at issue here render this case unsuitable to decide the question presented.

B. Following further percolation, a federal prosecution would present a better vehicle for exploring the issues discussed by the petition.

For all the reasons discussed in Part I, *supra*, no square split is presented here, and further percolation of these issues is warranted. However, if this Court were interested in the question of whether, when, and how a jury may consider a defendant's demeanor during a criminal trial, a petition arising from a federal, rather than a state, prosecution would present a more appropriate vehicle for delving into these issues in the first instance.

A federal prosecution would increase the analytical means at the Court's disposal for resolving the case, because it would allow the Court to consider potential non-constitutional constraints on a jury's consideration of a defendant's demeanor at trial, as some lower courts have done under their respective rules of evidence. While the Court is of course limited in its review of a final judgment of a state court, a federal case would allow the Court to consider not only any constitutional principles allegedly at issue but also the Federal Rules of Evidence. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993)

("We interpret the legislatively enacted Federal Rules of Evidence as we would any statute."). Rule 404(a) of the Federal Rules of Evidence prohibits admission of evidence of a "person's character or character trait" to prove "that on a particular occasion the person acted in accordance with the character or trait." Multiple decisions, including many cited by the petitioner, have analyzed a prosecutor's comments on a non-testifying defendant's courtroom demeanor through this lens, as potentially inadmissible character evidence. *See*, *e.g.*, *Schuler*, 813 F.2 at 980 (prosecutor's comment on demeanor "in effect" introduced evidence of the defendant's character "solely to prove guilt," in violation of Fed. R. Evid. 404(a)); *Pearson*, 746 F.2d at 796 (prosecutor's comment on demeanor "introduced character evidence for the sole purpose of proving guilt"); *Carroll*, 678 F.2d at 1210 (prosecutor "introduced evidence of character—courtroom demeanor—solely to prove guilt" in violation of Fed. R. Evid. 404(a)); *Wright*, 489 F.2d at 1186 (prosecutor may not "comment on the character of the accused as evidenced by his courtroom behavior"); *Good*, 723 S.W.2d at 737 (prosecutor's comment was "an invitation for the jury to convict . . . based on rank speculation of bad character rather than evidence of guilt").

A petition arising from a federal prosecution would thus enhance the Court's flexibility in considering the issue of defendant demeanor in a courtroom. For this additional reason, this case is far from an ideal vehicle for deciding the question presented.

C. A conclusion on the question presented alone would not result in relief for the petitioner.

This petition is not a suitable vehicle to consider the question presented for the further reason that, even if this Court were to conclude that the trial judge's response to the jury's question was erroneous and that reversal was required unless the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 23 (1967), the petitioner would not be entitled to relief. The strength of the case against him, combined with the lack of clarity regarding whether the jury considered his courtroom demeanor at all, renders any error harmless beyond a reasonable doubt.

The case against the petitioner was strong. The three bags of heroin and scales were found in a bedroom closet containing men's clothes, including a jacket with the petitioner's lease in its pocket. Pet. 1a-2a. On the day of the search, police seized keys from the petitioner that included a key to that closet as well as a key to a locked file cabinet in the closet. Pet. App. 1a n.1, 2a. And the petitioner conceded ownership of the two smaller bags of heroin found inside of the locked file cabinet, contesting only the larger bag, found in the same closet. Pet. App. 2a.

The record belies the petition's assertion that any error was not harmless because the jury's "request to consider [the petitioner's] demeanor" is "one obvious explanation" for the jury's acquitting his co-defendant Delacruz while convicting the petitioner. Pet. 19. To begin with, this assertion rests on an assumption that the jury was interested in, and considered, the petitioner's courtroom demeanor. As discussed *supra*

at 15 & n.9, the jury's note is ambiguous on that point. Indeed, in light of the trial court's instructions, this Court should presume that the jury did not consider the petitioner's courtroom demeanor as evidence at all. *See supra* at 16-17. In any event, a much more obvious explanation for the verdict in this case is that the evidence against the petitioner was significantly stronger than the evidence against his girlfriend Delacruz: Police did not find any keys upon searching Delacruz's person, while the petitioner held the keys to the closet and file cabinet where all of the heroin was found; the closet where the heroin was found contained clothes traditionally associated with men; and no heroin was found in the closet of the other bedroom, which contained clothes traditionally associated with women. Pet. App. 1a, 1a n.1, 2a; T(2) 15. There is thus no basis to presume that the jury's verdict hinged on considering some unknown aspect of the petitioner's (or his co-defendant's) courtroom demeanor.

Accordingly, given the strong evidence pointing toward the petitioner as the owner of the heroin recovered from his bedroom clothes closet and the locked cabinet therein to which he held the keys, any error in the trial court's response to the jury's question was harmless beyond a reasonable doubt. Because the judgment below should be affirmed on this basis no matter how this Court resolved the question presented, this petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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